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No._____
No. 58658-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Parentage of:
MARNITA FRAZIER, Child,

JOHN CORBIN,
Respondent,
v.

PATRICIA REIMEN,
Petitioner,

EDWARD FRAZIER,
Respondent.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Hon. John Lucas

RESPONDENT'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

John Corbin asks this Court to accept review of the Court of Appeals decision terminating review. See Part B.

B. COURT OF APPEALS DECISION

Petitioner John Corbin seeks review of the Court of Appeals' decision, entered November 5, 2007, reversing the trial court order denying Patricia Reimen's motion to dismiss his *de facto* parent petition as a matter of law. A copy of this decision is attached.

C. ISSUES PRESENTED FOR REVIEW

1. What must a *de facto* parent petitioner establish in pleadings and proof to be granted a trial on the merits?

2. Is a person who pleads and presents *prima facie* proof of the *de facto* parent factors precluded from the cause of action because he was, during a portion of his *de facto* parentage, also a stepparent?

3. Is the *de facto* parent doctrine limited to lesbian partners who co-parented since the child's birth?

4. Is an unconstitutional statute a nullity and, therefore, not a statutory remedy available to a *de facto* parent petitioner?

5. Is the existence of the nonparental custody petition a bar to the *de facto* parent cause of action, which is an action to establish parentage, not a challenge to a parent's fitness?

6. Was the modification issue waived because not raised below and, in any case, was adequate cause established or, if not, is the remedy remand for joinder?

D. STATEMENT OF THE CASE

The 14 year old child, M.F., has been parented by John Corbin for nearly all her life, beginning when she was an infant and her mother, Patricia Reimen, and John Corbin began to cohabit, then through the years of the Reimen-Corbin marriage, then during the years following their 2000 separation and 2002 divorce. With Reimen's encouragement, M.F. calls Corbin "Dad" and "Daddy" and calls herself by his last name. She has two half-brothers, born to Corbin and Reimen, who share the same residential schedule with M.F. following their parents' separation. M.F. has had little contact with her legal and biological father, Ed Frazier, who also consented to Corbin acting as M.F.'s father before, during, and after Corbin's marriage to Reimen. He now supports Corbin's *de facto* parent petition. See CP 20-28 (commissioner's findings); see, also, CP 7-10, 37-66, 132-154, 192-204, 233-283, 214-217; 316-323, 324-328.[1]

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[1]On review of a CR 12(b)(6) or CR 56 ruling, this Court presumes the plaintiff's or, in this case, John Corbin's factual allegations are true. ***Haberman v. WPPSS,*** 109 Wn.2d 107, 120, 744 P.2d 1032 (1987) (*quoting* ***Bowman v. John Doe,*** 104 Wn.2d 181, 183, 704 P.2d 140 (1985)). This Court applied this same standard to disputed facts in ***In re Parentage of LB,*** 155 Wn.2d 679, 684 n2, 122 P.3d 161 (2005), which was in a similar procedural posture.

In 2005, Corbin grew concerned over the impact on the children of the mother's lifestyle and decision-making. Both agreed to seek counseling for the children and for themselves as co-parents. After the chosen psychologist, Dr. Newell, issued a report criticizing the mother for causing some of these problems, Reimen unilaterally terminated counseling. CP 329-381. The children's troubles grew worse. Corbin petitioned to modify the parenting plan governing their two sons. Reimen abruptly terminated Corbin's contact with M.F., so that the child no longer saw Corbin at all and saw her brothers only half-time, during their mother's residential time. Consequences to all three of the children of this disruption were profound. CP 10, 192-204, 316-328, 329-381.

Several months after this rupture, this Court issued ***In re Parentage of L.B.,*** 155 Wn.2d 679, 122 P.3d 161 (2005). Several months after that, Corbin petitioned to be declared M.F.'s *de facto* parent. CP 313-315. Both Reimen and Frazier were made parties. CP 311-312. Corbin's petition alleged the *de facto* parent factors, including: that M.F.'s legal parents had "consented to and fostered a parent-like relationship for a period of eleven years" between M.F. and Corbin and that Corbin and M.F. lived together in the same household for those eleven years, including the five years after Corbin and Reimen separated (2000) and then divorced (2002). CP 314. He alleged that he "assumed and

continues to assume the obligations of parenthood without an expectation of financial compensation," though residential time was abruptly and unilaterally terminated by Reimen in August 2005. CP 314-315. Corbin also moved for a threshold factual determination of his claim and for temporary orders. CP 284-310, 233-283.

Reimen moved to dismiss Corbin's petition for failure to state a claim pursuant to CR 12(b)(6). CP 218-230. She argued he could not petition as a *de facto* parent because stepparents have no custody or visitation rights and because ***L.B.*** is limited to its facts, meaning to lesbian partners who had co-parented since birth. CP 221-223. She argued that Corbin had statutory remedies, but also argued that Corbin could not meet the burden of RCW 26.10.030 (nonparental custody statute). CP 222-227.

Corbin responded to Reimen's motion under CR 12(b)(6) and as a motion for summary judgment. CP 205-213. He argued that, as a matter of law, the *de facto* parent doctrine did not distinguish between petitioners on the basis of sexual orientation. CP 206-209. He argued that he had both pled the cause of action and that he had, *prima facie*, established it, defeating summary judgment. CP 207, 209-212. Frazier, M.F.'s legal father, filed pleadings in support of Corbin's petition.[2] E.g., CP 214-217.

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[2] Though the Court of Appeals declared that the record "does not show whether Frazier appeared below," (Slip op., at 3), Frazier filed pleadings in support of Corbin's action and appeared for deposition. CP 51-52, 214-217. ***See Morin v. Burris,*** 160 Wn.2d 745, 755-

The Honorable Judge Eric Lucas denied the motion to dismiss.[3] He ruled that former stepparents were not, as a matter of law, precluded from petitioning as *de facto* parents and that ***L.B.*** "provides a general cause of action if a party can establish the criteria provided in ***L.B.*** for a *de facto* parent." CP 16. The court held that the doctrine was not limited to same sex parents. The court set forth the *de facto* parent factors and held that "[c]learly there is a *prima facie* showing in this case." CP 17.[4]

An additional fact-based analysis was undertaken by the family court commissioner in a threshold hearing preliminary to entering temporary orders. There the commissioner made extensive factual findings on the ***L.B.*** factors and concluded that Corbin had, *prima facie*, established he is M.F.'s *de facto* parent. CP 20-28. The court appointed a

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56, 161 P.3d 956 (2007) (when determining whether a party has appeared, Washington does not elevate form over substance, but looks to substantial compliance).

[3] Under either rule 12 or 56, dismissal is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." ***Haberman v. WPPSS,*** 109 Wn.2d at 120 (quoting ***Bowman v. John Doe,*** 104 Wn.2d at 183). Motions to dismiss "should be granted only 'sparingly and with care.'" ***Id.***

[4]The Court of Appeals paid little attention to the court's written order, but emphasized one statement in the trial court's oral ruling (Slip op., at 6), where the trial court said: "Clearly, there's a *prima facie* showing of [the *de facto* parent claim], just from the fact of the marriage and the length of the marriage." CP 85. However, it is clear the court considered the factors and applied the standard for CR 12(b)(6), observing that "when this gets to trial, of course, that is going to be an issue." Id. The trial court's written order does not include the statement that the marriage alone satisfies *prima facie* the *de facto* parent test. In any case, review by the appellate court is *de novo*, so the court's oral ruling is not in any way binding.

guardian *ad litem* and ordered reunification in accord with the recommendations of the guardian and the children's new psychologist, Dr. Stephen Taylor. Eventually, M.F. was restored to the same residential schedule as her brothers (roughly half-time in each household). CP 5-6.

Reimen sought and was granted discretionary review, though the appellate court denied Reimen's motion to stay the temporary residential schedule. Ultimately, the Court of Appeals reversed the trial court's order denying dismissal of Corbin's *de facto* parent petition, holding that Corbin could not petition as a *de facto* parent as a matter of law because he is a former stepparent and, therefore, had statutory remedies, citing the unconstitutional RCW 26.09.240 and the nonparental custody statute, RCW 26.10.030. The court declared "[t]he correct starting point for analysis of the motion [for judgment as a matter of law] is not whether the *de facto* parent test has been met. Rather, the question is whether *de facto* parenthood may be applied at all to the circumstances of this case." Slip op., at 6. The court did not address the fact that Corbin had parented M.F. before and after his marriage to the mother, with both legal parents' consent, but declared that ***L.B.*** provides no cause of action to a former stepparent.

Aggrieved by this decision, Corbin seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Summary

This case involves a child, who is now 14, and a man who has for nearly all her life acted as father to her. He was her "stepfather," meaning married to her mother, for only slightly more than half of this time. He assumed the father role – before, during, and after his marriage to the mother - with the mother's active encouragement and with the consent, and now active support, of the legal father, who, having been marginalized by the mother, has spent very little time with M.F. Now the mother has sought to excise Corbin from M.F.'s life and the Court of Appeals has declared he has no cause of action as a matter of law. However, if Corbin is not a *de facto* parent, on these exceptional facts, or, at least, if he is not granted a trial to prove that he is, then no one in Washington is.

This case merits review because it conflicts with this Court's decision in ***In re Parentage of L.B.***, 155 Wn.2d 679, 122 P.3d 161 (2005) and presents an issue of substantial public interest. RAP 13.4(b) (1) and (4). Indeed, the Court of Appeals utterly extinguishes the *de facto* parent doctrine. The court declared that ***L.B.*** did not apply to Corbin because he was a stepparent and had statutory remedies in the form of RCW 26.09.240 and a nonparental custody action. But the former statute is no remedy at all, being facially unconstitutional and a nullity, and the latter is

not an action to establish parentage, but one that challenges a parent's conduct. The nonparental custody statute requires proof of parental unfitness or harm to the child and is not, therefore, the remedy Corbin does or must seek. Rather, as did the petitioner in ***L.B.,*** Corbin seeks a determination that he is M.F.'s parent. The existence of the nonparental custody statute should be no more of a bar to his petition than it was to Carvin's in ***L.B.*** Otherwise, there is nothing left of the *de facto* parent doctrine and this Court's decision in ***L.B.*** will be rendered an empty shell.

1. CORBIN HAS ESTABLISHED *PRIMA FACIE* THAT HE IS A *DE FACTO* PARENT AND DESERVES A TRIAL ON THE MERITS.

In fulfillment of its duty "to 'endeavor to administer justice according to the promptings of reason and common sense,'" this Court fashioned an equitable remedy for parents who fall in the interstices of the statutory framework. ***L.B.,*** 155 Wn.2d at 176. Given the "ever changing and evolving notion of familial relations," this Court did not limit the types of people to whom the doctrine might apply, i.e., to lesbians only. ***Id.*** Rather, as an equitable remedy, the doctrine has as its hallmarks flexibility, mercy, and practicality. ***See Hecht Co. v. Bowles,*** 321 U.S. 321, 329-30, 64 S.Ct. 587, 88 L.Ed. 754 (1944) (speaking of equity generally), *cited with approval in* ***Kucera v. State, Dept. of Transp.,*** 140 Wn.2d 200, 222, 995 P.2d 63 (2000).

However, the remedy is not available to many, but, rather, proof of the *de facto* parent claim will be "no easy task." ***L.B.,*** 155 Wn.2d at 712. This justifiable difficulty arises from the factors that must be proved.

> (1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. ... In addition, recognition of a *de facto* parent is "limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life."

L.B., 155 Wn.2d at 708 (internal citations omitted). This test excludes temporary or transitory caregivers, compensated caregivers, and family members merely fulfilling their own roles (e.g., grandparental or sibling roles). This test excludes anyone whose parental relationship with a child has not been "consented to and fostered" by the legal parent(s). This test includes only "those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." ***Id.*** This test describes John Corbin.

For nearly all of M.F.'s life, at the urging of her mother and with the consent of her legal, but absent, father, Corbin has become M.F.'s father. He treats her with exactly the same devotion and love as he does the two sons born of his marriage to Reimen, and his love and care for

M.F. have continued post-divorce just as it has for his sons. M.F. calls him "Dad" and uses his name. She lives half-time with him and her brothers, spends vacations and holidays together with them, including Father's Day, and he provides for her in all the ways a parent does. Simply, they have been father and daughter for all but the earliest months of M.F.'s lfie.

Yet, the Court of Appeals persistently characterized Corbin as a stepparent merely, ignoring the pre-marital and post-marital relationship and ignoring that both M.F.'s legal parents continued, for years after the Corbin-Reimen dissolution, to consent to and foster the parent-child relationship between Corbin and M.F. In short, the court ignored two of the most unusual and salient facts of this case. ***L.B.*** instructs otherwise. The test it establishes is not only a difficult one, it is fact-driven and, necessarily, flexible. Categorical exclusions are anathema to equity, which is the expression of the court's duty "to meet and provide real solutions for the real problems of real people." ***Humphries v. Riveland et al.,*** 67 Wn.2d 376, 398, 407 P.2d 967 (1965) (Finley, J. dissenting). Thus, the court's analysis does not begin or end with labels (e.g., "stepparent" or "lesbian"), but explores the actual relationships. "When equitable claims are brought, the focus remains on the equities involved between the

parties." ***See, e.g., Vasquez v. Hawthorne,*** 145 Wn.2d 103, 107, 33 P.3d 735 (2001). Such claims are entrusted to trial, not summary judgment. ***Id.***

Accordingly, stepparents – or any other category of persons – are not automatically included or excluded. Certainly, this Court has wisely declined the opportunity to declare such a limitation. ***See, e.g., In re Custody of Shields,*** 157 Wn.2d 126, 132 n.1, 136 P.2d 117 (2006) (noting that stepmother did not claim *de facto* parent status without declaring that she would be prohibited from doing so). Corbin's role as M.F.'s father began before and continued long after his marriage to Reimen. That is, it is not the relationship to the legal parent alone that defines the *de facto* parent, as is the case with a stepparent, whose involvement in the child's life may vary wildly. ***See Zellmer v. Zellmer,*** 132 Wn. App. 674, 680, 133 P.3d 948 (2006) ("a stepparent's obligation to the child derives only from the circumstance of marriage."); RCW 26.16.205 (stepparent obligated to support only those stepchildren living with him/her). Rather, the equitable doctrine focuses on the relationship between the parent and the child, which exists in part because of the legal parent's encouragement, but also exists independently, surviving a rupture in the relationship of the two adults, as in ***L.B.***

In other words, ***L.B.*** makes certain that the nature of the relationship between the adult and the child be parent-like, not stepparent-

like, a significant distinction. In Washington, the category of *de facto* parent is "limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." 155 Wn.2d at 709. This quality of permanency of commitment eliminates the numerous, often important, but usually transitory relationships that children form with many caregivers. Here it is satisfied by the nature of Corbin's initial involvement, where, at Reimen's urging, he willingly undertook to be M.F.'s father. But, importantly, this quality is satisfied by the fact that the relationship between Corbin and M.F. did not change over the five years after Corbin and Reimen separated, a fact that surely secures the floodgates against wholesale stepparent petitions. As the family court commissioner here recognized, post-divorce, most stepparents "wean[ ] off" time with their stepchildren. CP 22. Corbin did not, and "[t]hat is very unusual." Id.

This Court devised the *de facto* parent doctrine to meet and provide real solutions for the real problems of real people. Requiring proof of five factors, the doctrine works to preserve for a child the fundamental stability that arises from a relationship with a parent, without causing a flood of *de facto* parents. The doctrine cannot serve that purpose if entire categories of "real people" are excluded from its operation, as the Court of Appeals would have it.

2. A FACIALLY UNCONSTITUTIONAL STATUTE IS A NULLITY, NOT AN AVAILABLE REMEDY.

According to the Court of Appeals, by virtue of his marriage to Reimen, Corbin has statutory means to protect the parent-child relationship with M.F. According to the court, RCW 26.09.240 "arguably would have provided a means by which Corbin could have obtained visitation with his former stepdaughter had he pursued that remedy during the 2002 dissolution of his marriage to Reimen." Slip op., at 7. In fact, for three separate reasons, the court is mistaken.

First, the statute is a nullity. It was recognized as unconstitutional by this Court in ***In re Parentage of C.A.M.A.,*** 154 Wn.2d 52, 61, 109 P.3d 405 (2005). Accordingly, as a nullity, RCW 26.09.240 "is as inoperative as if it had never been passed." ***Boeing Co. v. State,*** 74 Wn.2d 82, 88-89, 442 P.2d 970 (1968). ***Accord City of Redmond v. Moore,*** 151 Wn.2d 664, 669, 91 P.3d 875 (2004) (a facially unconstitutional statute is rendered totally inoperative). Simply, RCW 26.09.240 has always been unconstitutional.

Moreover, the statute's unconstitutionality was evident, since it suffered the same infirmity as its predecessor, declared unconstitutional in ***In re Custody of Smith,*** 137 Wn.2d 1, 18, 969 P.2d 21 (1998). As this Court observed in ***C.A.M.A.,*** "[w]hile [this version of RCW 26.09.240]

was not before the ***Smith*** court (though a precursor statute was), ***Smith*** did not limit application of constitutional requirements to the statutes challenged in that case." ***C.A.M.A.,*** 154 Wn.2d at 61. Both versions omitted any deference to the fit parent, applying instead a simple "best interests" substantive test. ***Id.,*** at 67. As this Court held in ***Smith***, this standard is insufficient as a compelling state interest overruling a parent's fundamental rights. 137 Wn.2d at 20. Yet, the Court of Appeals declares "at the time Corbin and Reimen dissolved their marriage, this statutory remedy was available to Corbin." Slip op, at 7-8. Plainly, it was not.[5]

Not only did this Court in ***Smith*** make clear the principles that rendered RCW 26.09.240 unconstitutional, the United States Supreme Court likewise did so. ***Troxel v. Granville,*** 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). There the court declared "the court must accord at least some special weight to the parent's own determination." ***Id.*** at 69-70. RCW 26.09.240, upon which the Court of Appeals tells Corbin he should have relied, did not satisfy this constitutional mandate.

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[5] The Court of Appeals relies on a Division Two case as holding that ***C.A.M.A.*** applies prospectively only. Slip op., at 7 n.20, *citing* ***In re Marriage of Anderson,*** 134 Wn. App. 506, 512, 141 P.3d 80 (2006). There the court invoked equity to enforce a former stepparent's visitation order entered in 1998, the year ***Smith*** was decided. Division Two acknowledged the presumption of retroactivity that attaches to unconstitutional statutes, but declared the presumption did not attach to RCW 26.09.240 because ***C.A.M.A.*** relied on ***Troxel***, with its narrower grounds, not ***Smith***. Clearly, that is not the case. ***See, e.g., C.A.M.A.,*** 154 Wn.2d at 68 ("***Smith*** requires more.").

Not only is this remedy illusory as a constitutional matter, it was procedurally unavailable to Corbin. The statute provides that "[a] person other than a parent may not petition for visitation under this section unless the child's parent or parents have commenced an action under this chapter." RCW 26.09.240(1) (emphasis added). That is, the statute allows intervention by a nonparent "in a pending dissolution, legal separation, or modification of parenting plan proceeding" commenced by the child's parents. ***Id.*** That would mean Corbin could intervene in a proceeding between Frazier and Reimen (assuming the statute was constitutional). This statute, devised with grandparents in mind, does not allow Corbin to petition for visitation with M.F. during the dissolution proceedings between himself and M.F. in 2002, as the Court of Appeals seemed to think. Slip op., at 6.

Thus, Corbin had no remedy in an unconstitutional statute under which he did not even have standing. To bar his *de facto* parent claim on this basis makes no sense. Moreover, of course, at the time of his divorce from Reimen, there was no need for resort to statutory remedies, since Reimen continued to foster Corbin's parenting of M.F., such that the child kept the same residential schedule as her brothers. It was not until 2005, when Reimen retaliated against Corbin by withholding M.F., that a remedy was needed at all. Certainly, there is no statute now. ***L.B.,*** 155

Wn.2d at 714-15 ("there exists no statutory right to third party visitation in Washington."). Certainly, it is no answer to this child and to this man now to speak of what Corbin could have done, any more than it was an answer to L.B. that Carvin might have adopted her. In any case, the statute was never available to Corbin for the many reasons set forth above.

3. THE EXISTENCE OF THE NONPARENTAL CUSTODY STATUTE DOES NOT PRECLUDE THE *DE FACTO* PARENT CAUSE OF ACTION.

The Court of Appeals also declared Corbin's *de facto* parent petition barred as a matter of law because "RCW 26.10.030 permits a nonparent to petition for custody of a child." Slip op., at 7. Theoretically, this "remedy" was also available to the petitioner (Carvin) in ***L.B.*** This "remedy" would have required her to establish standing, meaning that the child was not in the physical custody of the parent or that neither parent was a suitable custodian. RCW 26.10.030(1). Meaning, too, that to prevail, the petitioner must show the parents to be unfit or "that placement of the child with the fit parent will result in actual detriment to the child's growth and development." ***Custody of Shields,*** 157 Wn.2d at 144.

However, both Carvin and Corbin seek to establish and protect a parent-child relationship, not challenge one. The nonparental custody is a completely different remedy for a completely different circumstance and is judged by a completely different standard. Indeed, the Court of Appeals

itself observes that "Corbin does not claim and no court has determined that Reimen is an unfit parent. Moreover, there is no claim and no court determination that there is any detriment to the child." Slip op., at 9. Reimen likewise asserted Corbin could make no claim for nonparental custody. CP 222-223.

It is not simply a matter of this claim being difficult to prove, as the Court of Appeals suggests. Slip op., at 12. The nonparental custody statute is no remedy for Corbin's petition to be declared M.F.'s parent, not to usurp Reimen, but to stand in parity with her. Or, if it is his remedy, if its existence bars Corbin's petition, it necessarily follows that the statute bars every *de facto* parent petitioner. ***L.B.*** did not so hold. Indeed, were this the case, there would be no *de facto* parent doctrine at all.

4. THE COURT OF APPEALS FAILED TO APPLY THE PROPER STANDARD OF REVIEW TO THE MOTION TO DISMISS.

The Court of Appeals simply ignored the standard of review in this case, with important consequences. There has been no trial in this case, meaning that Reimen had the burden to establish dismissal under CR 12 or CR 56. Accordingly, Corbin's factual allegations were to be taken as true, not ignored, as the Court of Appeals did. Nor did the court undertake *de novo* review of the trial court's ruling, but, rather, focused on one sentence in the trial court's oral ruling about marriage satisfying *prima facie* the *de*

facto parent factors. Slip op., at 6. Corbin would concede this statement is incorrect, but does not concede this statement captures the trial court's actual ruling. In any case, the trial court's ruling does not control.

Ultimately, the Court of Appeals did not conduct a *de novo* review and ignored the rule that the trial court will be sustained "upon any theory established in the pleadings and supported by proof." ***Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.,*** 134 Wn.2d 692, 952 P.2d 590 (1998) (citations omitted). Corbin's case is at the starting gate, not the finish line. He has pled and proved *prima facie* the *de facto* parent factors. Dismissal of his claim as a matter of law is completely unwarranted. Under proper application of the court's own rules, he is entitled to a trial on the merits.

5. THE REMEDY FOR THE MODIFICATION ISSUE, RAISED FOR THE FIRST TIME ON APPEAL, IS REMAND FOR JOINDER.

The Court of Appeals also held that Corbin's petition must be dismissed because he did not satisfy the adequate cause standard for modification of the parenting plan entered in 1995 pursuant to the Reimen-Frazier dissolution. Slip op., at 13-14. This issue was raised for the first time by Reimen in the appellate court. (She objected in the trial court to venue in Snohomish County, rather than Chelan County, where her divorce from Frazier was finalized and where Frazier lives. CP 227-228. Frazier did not object on any basis.) By not raising this issue below,

she waived any objection and the Court of Appeals should not have considered the issue. ***Ferrin v. Donnellefeld,*** 74 Wn.2d 283, 444 P.2d 701 (1968). Corbin's claim should not be foreclosed because the trial court did not determine an issue it was not asked to determine.

Moreover, in holding otherwise, the Court of Appeals elevates form over substance. The family court commissioner in this case entered extensive factual findings, which make clear that there is adequate cause for modification of the Reimen-Frazier parenting plan. CP 20-28. ***See, e.g.,*** RCW 26.09.260 (allowing modification upon a substantial change of circumstances and child's integration into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan). In agreeing with Reimen that the threshold was not met, the Court of Appeals certainly did not view the facts in the light most favorable to Corbin or give any deference to the trial court's determination. ***See In re Parentage of Jannot,*** 149 Wn.2d 123, 125, 65 P.3d 664 (2003) (abuse of discretion applies to adequate cause determination).

The Court of Appeals' reversal of the trial court's order on this basis is unjustified and strange. Reimen failed to raise this issue below. The extensive findings of the commissioner, given proper deference, surely establish adequate cause for modification. The trial court judicial officers understandably expressed some uncertainty as to the proper

procedure to apply to the newly minted *de facto* parent action. Given all these circumstances, and if there is a defect in the proceedings, then the remedy is not reversal but remand for joinder of a modification action pursuant to CR 18. Weber, 21 ***Wash. Pract.*** § 47.46 ("Civil Rule 18 permits joinder of several claims into one proceeding under RCWA 26.09 or a proceeding under the parentage act, RCWA 26.26."). The harsh conclusion of the Court of Appeals to the contrary is at odds with this plethora of procedural rules and with fundamental fairness. Certainly, it utterly ignores that where, as here, the child's welfare and most fundamental relationship are the court's principal concern, "the best interests of the child control." ***McDaniels v. Carlson,*** 108 Wn.2d 299, 309-10, 738 P.2d 254 (1987).

F. CONCLUSION

For the foregoing reasons, John Corbin asks this Court to take review and to reverse the Court of Appeals decision and to remand this case back to superior court for trial on his *de facto* parent petition.

Dated this 5th day of December 2007.

RESPECTFULLY SUBMITTED,

PATRICIA NOVOTNY
WSBA #13604
Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Parentage of:	)	No. 58658-1-I
M.F., (DOB: 12-15-93),	)	DIVISION ONE
Child,	)	
and	)	
JOHN CORBIN,	)	PUBLISHED
Respondent/Step-Father,	)	FILED: November 5, 2007
PATRICIA REIMEN,	)	
Appellant/Mother,	)	
EDWARD FRAZIER,	)	
Respondent/Father.	)	

COX, J. — The primary issue in this case is whether John Corbin has a cause of action as a *de facto* parent for residential time with M.F., his former stepdaughter.[1] We hold that he does not. We must also decide whether the existing parenting plan governing residential time with M.F. may be modified

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[1] See In re Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005), cert. denied, 126 S. Ct. 2021, 164 L. Ed. 2d 806 (2006) (holding that a common law claim of *de facto* parentage existed such that a woman had standing to petition for rights and responsibilities of shared parentage with her former partner).

without the statutorily required showing of adequate cause.[2] We hold that a showing of adequate cause is required, and none has been shown here. We reverse and dismiss.

The parties do not substantially dispute the material facts. Patricia Reimen and Edwin Frazier are the biological parents of M.F., whose date of birth was December 15, 1993. The parental rights and obligations of Reimen and Frazier with respect to M.F., their daughter, are set forth in the parenting plan entered on August 2, 1995, as part of the dissolution of their marriage.

The parenting plan provides that M.F. will reside primarily with Reimen, with alternating weekend residential time and some holidays with Frazier. The plan also provides that Frazier and Reimen shall have joint decision making power. Frazier, who lives in Wenatchee, has consistently paid his child support obligation to Reimen, who lives in Monroe. While Reimen and Frazier have not always strictly adhered to the residential schedule, the plan has never been modified by court order.

Reimen and Corbin were married in October 1995. They are the parents of two sons. Reimen and Corbin separated in 2000. The parental rights and obligations of Reimen and Corbin with respect to their two sons are set forth in the parenting plan entered on December 13, 2002, as part of the dissolution of their marriage. This parenting plan does not apply to M.F. Nevertheless, Corbin

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[2] RCW 26.09.260(1) provides: "[T]he court shall not modify a . . . parenting plan unless it finds . . . a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child."

continued to have regular contact with M.F. and his two sons with Reimen until August 2005.

In August 2005, Corbin moved to modify the parenting plan governing the two sons he had with Reimen. After this, M.F. abruptly stopped spending time with Corbin. Reimen and Corbin dispute why M.F. stopped seeing him.

In November 2005, the supreme court decided In re Parentage of L.B.[3] In March 2006, Corbin commenced this proceeding, seeking to be declared a *de facto* parent of M.F. and seeking residential time with her based solely on that case.[4] Reimen and Frazier are both named as parties.

The record that is before us does not show whether Frazier appeared below. He has not participated in this appeal.

Reimen, pursuant to CR 12(b)(6), moved to dismiss the petition. The trial court denied the motion in its oral decision of June 7, 2006.[5] The court entered its order on August 8, 2006.[6]

Following the court's oral decision in June, a superior court commissioner entered two orders. One was a temporary order that made a threshold determination that Corbin is a *de facto* parent and ordered a reunification process between him and his former stepdaughter. The other order appointed a guardian

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[3] 155 Wn.2d 679, 122 P.3d 161 (2005).

[4] Petition for De Facto Parent Rights, Clerk's Papers at 313-15.

[5] Report of Proceedings (June 7, 2006) at 22-25.

[6] Clerk's Papers at 15-18.

ad litem for M.F. and directed further actions. A superior court judge denied Reimen's motion to revise these two orders.

We granted discretionary review.

DE FACTO PARENT

Reimen argues that the trial court erred in denying her CR 12(b)(6) motion to dismiss Corbin's action. We hold that L.B. does not create a common law cause of action for a former stepparent as a *de facto* parent of a former stepchild where statutory remedies are available.

To prevail, the moving party in a CR 12(b)(6) motion has the burden to establish beyond doubt that the claimant can prove no set of facts consistent with the complaint that would justify recovery.[7] Factual allegations and any reasonable inferences are taken as true.[8] The motion should be "granted sparingly so that a plaintiff is not improperly denied adjudication on the merits."[9]

Interpretation and application of common law causes of action are questions of law that we review de novo.[10]

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[7] San Juan County v. No New Gas Tax, 160 Wn.2d 141,164, 157 P.3d 831 (2007).

[8] Reid v. Pierce County, 136 Wn.2d 195, 201, 961 P.2d 333 (1998); see also L.B., 155 Wn.2d at 684 n.2.

[9] Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 635, 128 P.3d 627 (2006), review denied, 158 Wn.2d 1029 (2007).

[10] Hudon v. W. Valley Sch. Dist. No. 208, 123 Wn. App. 116, 123, 97 P.3d 39 (2004).

Here, Corbin did not assert any of the statutory bases for seeking contact with M.F., his former stepdaughter.[11] Rather, Corbin alleges only that he is a *de facto* parent of M.F. Reimen moved for dismissal of this action, arguing that Corbin had no right to relief on the basis of his sole claim that he is a *de facto* parent of his former stepdaughter.[12]

The trial court agreed with Corbin. In making its oral ruling, it purported to focus on the test for establishing *de facto* parenthood, a factual determination.[13] After quoting the test for a *de facto* parent from L.B., the court stated that

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[11] RCW 26.10.030 permits a nonparent to petition for child custody, subject to the requirements of the statutes. RCW 26.09.240 authorizes a nonparent to petition for visitation with a child, subject to case authority dealing with the constitutionality of that statute and the prospective application of that constitutional rule. See, e.g., In re Parentage of C.A.M.A., 154 Wn.2d 52, 66, 109 P.3d 405 (2005) (declaring unconstitutional RCW 26.09.240, which presumed grandparent visitation was in best interests of child); In re Marriage of Anderson, 134 Wn. App. 506, 512, 141 P.3d 80 (2006) (holding that former stepfather could enforce an existing parenting plan that gave him visitation rights with his former stepdaughter because C.A.M.A. applies prospectively only).

[12] While Reimen is the biological parent of M.F., we use the word "parent" to include biological and adoptive parents as well as those who properly fall within the scope of *de facto* parents under L.B. See also In re Custody of H.S.H.-K, 193 Wis. 2d 649, 533 N.W.2d 419, 421 (1995) (referring to biological or adoptive parent's constitutionally protected interests).

[13] The *de facto* parent test requires: (1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood without expectation of financial compensation; and (4) the petitioner has been in a parental role for a sufficient time to have established with the child a bonded, dependent relationship, parental in nature. Additionally, recognition of a *de facto parent* is "limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." L.B., 155 Wn.2d at 708.

"[T]here's a prima facie showing [in this case] of that, just from the fact of the marriage and the length of the marriage."[14] This was error.

Assuming for purposes of argument only that the proper focus of the threshold inquiry for this motion is the test stated in L.B., the trial court misapplied that test. *De facto* parent status does not exist merely by the fact of marriage and the length of the marriage. Rather, as the four elements of the test state, more is required. Among the additional elements is the requirement that the natural or legal parent consents to and fosters the parent-like relationship. The petitioner and child must also live together in the same household. The petitioner must also assume parental obligations without expectation of financial compensation. And petitioner must show that the parental role has existed for sufficient time to establish the required relationship with the child. The trial court's statement of what constitutes a prima facie case for *de facto* parenthood omitted reference to these other necessary factors. Accordingly, it was incorrect.

Regardless, there is a more basic reason why the trial court's denial of the dismissal motion was incorrect. The correct starting point for analysis of the motion is not whether the *de facto* parent test has been met. Rather, the question is whether *de facto* parenthood may be applied at all to the circumstances of this case. For the reasons stated below, we conclude that it cannot.

We start with the observation that existing statutes permit a former stepparent to assert rights for residential time with a former stepchild. For

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[14] Clerk's Papers at 86.

example, RCW 26.10.030 permits a nonparent to petition for custody of a child.[15] Provisions for child custody, visitation, and support are considered when a court enters an order under Chapter 26.10 RCW.[16] The state supreme court found no constitutional infirmity with RCW 26.10.030(1), permitting a person other than a parent to petition for child custody.[17]

We also note that RCW 26.09.240 arguably would have provided a means by which Corbin could have obtained visitation with his former stepdaughter had he pursued that remedy during the 2002 dissolution of his marriage to Reimen.[18] The supreme court declared that statute unconstitutional in 2005 in In re Parentage of C.A.M.A.[19] But a Division Two case recently held that C.A.M.A. applies prospectively only.[20] Thus, at the time Corbin and Reimen dissolved their

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[15] The statute provides: "[A] child custody proceeding is commenced in the superior court by a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian." RCW 26.10.030(1). We note that the legislature has largely abandoned the term "custody" in favor of defining relative levels of residency time with the child. L.B., 155 Wn.2d at 700 n.21; see also RCW 26.09.184(5).

[16] See RCW 26.10.040(1)(a).

[17] In re Custody of Shields, 157 Wn.2d 126, 137, 144, 136 P.3d 117 (2006).

[18] RCW 26.09.240.

[19] 154 Wn.2d 52, 66, 109 P.3d 405 (2005).

[20] In re Marriage of Anderson, 134 Wn. App. 506, 512, 141 P.3d 80 (2006).

marriage, this statutory remedy was available to Corbin. For reasons that are unexplained in this record, he did not seek visitation with M.F. at that time.

Although Corbin argues that the *de facto* parent cause of action should be available to him, he offers no persuasive argument why the statutes dealing with this subject matter are inadequate to address his situation. Rather, he relies solely on L.B. to avoid the requirements of these statutes.

In an attempt to persuade this court that the statutory procedures need not be followed here, Corbin urges that where a child's well-being requires recognition of three parents, the court should endorse a flexible approach. He emphasizes legal developments recognizing that a child has an interest in maintaining relationships independent of parental interests. Further, Corbin argues that under Washington's Parenting Act, there is no impediment to a three-way parenting plan. The parties give differing significance to the fact that Washington statutes generally adhere to the two-parent/mother-father paradigm. Corbin argues that the mother-father paradigm is merely descriptive of most situations but not injunctive as statutes for multiple-parent adoption and childbearing reflect.

Even if we assume that some or all of the above assertions are correct, we are not persuaded that they support disregarding existing statutes dealing with this subject matter. Moreover, these arguments do not compel courts to fashion a remedy.

We are also concerned about the constitutional implications of permitting a former stepparent and the courts to intervene in the decision-making process of a

fit parent. Here, Corbin does not claim and no court has determined that Reimen is an unfit parent. Moreover, there is no claim and no court determination that there is any detriment to the child.

As Troxel v. Granville and other cases indicate, there is a fundamental right that a fit parent has in the care, custody, and control of a child.[21] Intervention by others, including courts, in that process is permitted only under limited circumstances. And the heightened standard that controls such intervention requires a showing of detriment to the child, not the more lenient best interests of the child standard. Significantly, the former standard controls under Washington's current nonparental child custody statute.[22]

We have no reason in this case to either adopt or reject principles set out in the American Law Institute's Principles of the Law of Family Dissolution. But we note that Corbin may be foreclosed from now bringing a *de facto* parent action under those principles. They provide that "[a]ll of the following individuals should be given a right to bring an action: . . . (c) a de facto parent of the child, . . . ***who has resided with the child within the six-month period prior to the filing of the action*** or who has consistently maintained or attempted to maintain the parental relationship since residing with the child."[23]

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[21] 530 U.S. 57, 60, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

[22] See Shields, 157 Wn.2d at 144.

[23] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.04 (1)(c) (emphasis added).

Assuming for purposes of argument only that Corbin qualified as a *de facto* parent under ALI Principles, his action would arguably be barred because he failed to bring it within the requisite six-month period stated above.[24] Whether Corbin would qualify under the other clause stated in the principle sufficient to exempt him from the six-month requirement is uncertain.

Parentage of L.B.

We turn to Corbin's reliance on L.B. for authority to bring his petition. We conclude that case is distinguishable and does not control this matter.

There, the parties became romantically involved in a same-sex relationship during which they cohabited.[25] They decided to conceive a child, and a male friend donated sperm to assist the insemination.[26] Both parties attended prenatal medical appointments and birthing classes.[27] Both were present during the birth of L.B.[28] They co-parented the child until their relationship acrimoniously ended six years later, and litigation over access to L.B. began.[29]

One of the members of the relationship petitioned for the establishment of parentage under the statutes. She also sought to be declared a parent by

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[24] See Id.

[25] L.B., 155 Wn.2d at 683.

[26] Id. at 683-84.

[27] Id. at 684.

[28] Id.

[29] Id.

estoppel or as a *de facto* parent.[30] A court commissioner dismissed the petition, and a superior court judge "reluctantly" affirmed.[31] This court reversed, holding that a common law claim of *de facto* parentage existed.[32] The supreme court granted a petition for review.[33]

The supreme court framed the issue before it as whether "[I]n the absence of a statutory remedy, the equitable power of our courts in domestic matters permits a remedy *outside* of the statutory scheme."[34] The court reviewed legislative enactments regarding child custody and visitation to discern state policy and to determine whether clear legislative intent existed to preempt common law rights in that situation.[35] The court concluded that the Uniform Parentage Act and corresponding statutes do not purport to preclude operation of the common law in addressing situations left unanswered after a strict statutory inquiry.[36]

The L.B. court's exhaustive review of the State's legislative enactments and case law revealed that Washington courts have a recognized and accepted

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[30] Id. at 685.

[31] Id.

[32] Id. at 686; In re Parentage of L.B., 121 Wn. App. 460, 485, 89 P.3d 271 (2004).

[33] L.B., 155 Wn.2d at 687.

[34] Id. at 688 (emphasis in original).

[35] Id. at 694-95.

[36] Id. at 696.

role in resolving family law disputes, especially when the legislative enactments speak to an issue incompletely.[37] The common law provides a means for the court, in the absence of governing statutes, to "administer justice according to the promptings of reason and common sense."[38]

Acknowledging that the State's current statutory scheme fails to contemplate all potential scenarios that could arise in the changing and evolving notion of family relations, the court found that State statutes failed to speak to the particular situation presented in L.B. Therefore, in order to "fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy," the supreme court fashioned an equitable remedy.[39] It recognized a common law *de facto* parent cause of action.

L.B. is distinguishable. There, the court framed the issue in terms of whether an equitable remedy was required in the absence of a statutory procedure regulating the subject matter. Here, there is a statutory framework that is designed to address custody and visitation under the circumstances of this case. As we have already observed, Corbin has failed to persuade us that the statutory procedures are inadequate or incomplete. That it may be difficult for him to fulfill the statutory requirements does not persuade us that those requirements are inadequate or incomplete in the sense that requires application of the *de facto* parent doctrine.

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[37] Id. at 701.

[38] Id. at 689.

[39] Id. at 707.

We also note that both L.B. and the cases on which it relied involved providing access to the courts to those who might otherwise have been barred from visitation with the child. Here, there is no such similar bar. Rather, this is a case of disputes arising in a blended family resulting from consecutive marriages. The legislature contemplated this situation in the existing statutory framework.

To summarize, there is no cause of action of *de facto* parentage that supports the petition of Corbin for residential time with his former stepdaughter.

MODIFICATION OF PARENTING PLAN

Reimen argues that even if Corbin could establish that he is a *de facto* parent, he must still meet the adequate cause threshold to modify the existing parenting plan. She also argues that he has failed to do so. We agree with both contentions.

The statutory procedures for establishing adequate cause and requesting modification of a parenting plan are set out in Chapter 26.09 RCW. The party petitioning for modification must submit an affidavit supporting the requested modification, and the non-moving party may file opposing affidavits.[40] Unless the court finds that the affidavits establish adequate cause for a full hearing of the modification petition, the court shall deny the petition.[41]

A court may not modify a parenting plan unless it finds (1) that there has been a substantial change in the circumstances of the child or the non-moving

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[40] RCW 26.09.270.

[41] Id.

party, (2) modification is in the best interests of the child, and (3) modification is necessary to serve the best interest of the child.[42]

Here, the declaration in support of Corbin's motion did not address the adequate cause threshold standard of RCW 26.09.260. Moreover, the court failed to make any of the statutorily required findings for adequate cause.

Although Corbin argues that the adequate cause determination was implicit in the court's order, a review of the relevant parts of the order shows otherwise. The superior court commissioner stated:

> 3. This is a new area of law and it would seem that there needs to be a threshold determination in this case, which was what was contemplated in L.B. By way of comparison, the closest thing the court can look at is an adequate cause determination, which is more than a prima facie case; there has to be solid factual basis for sending the matter to trial. It is not conclusively determinative on a trial court regarding the outcome of the case but sets it into a procedural posture and allows temporary orders to proceed and allows it to go to trial where that may be affirmed or dismissed. That is the proper process in this case. If there is no threshold, there would be no purpose in continuing the matter.[43]

These observations do not fulfill the adequate cause requirements of the statutes. Failure to apply the modification requirements of RCW 26.09.260 constitutes an abuse of discretion.[44] We must reverse.

OTHER ORDERS

The remaining orders that are before us for review are the superior court's order denying Reimen's motion for revision of the commissioner's two orders and

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[42] RCW 26.09.260(1).

[43] Clerk's Papers at 21.

[44] In re Parentage of Jannot, 110 Wn. App. 16, 22, 37 P.3d 1265 (2002).

the order appointing the guardian ad litem. We apply the usual standard of review to these orders.[45]

There is no cause of action to support this case. Accordingly, these orders are improper.

We reverse the order denying Reimen's CR 12(b)(6) motion, the order on revision, and the two underlying orders of the commissioner. We dismiss Corbin's petition seeking visitation.

Cox, J.

WE CONCUR:

Coleman, J.

Becker, J.

[45] State v. Wicker, 105 Wn. App. 428, 432-33, 20 P.3d 1007 (2001).